FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1652

FEDERAL ENERGY REGULATORY COMMISSION, *Petitioner*,

v.

SHELL OIL COMPANY, ET AL., *Respondents*,

No. 77-1654

CONSUMER FEDERATION OF AMERICA,
ENERGY POLICY TASK FORCE, *Petitioner*,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT STATE OF LOUISIANA

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BRIEF OF RESPONDENT STATE OF LOUISIANA

Respondent State of Louisiana (Louisiana) submits the following brief in response to briefs filed by the Federal Energy Regulatory Commission (Commission)

and the Consumer Federation of America, Energy Policy Task Force, and the briefs *amicus curiae* submitted on behalf of Associated Gas Distributors (AGD) and Action Alliance of Senior Citizens of Greater Philadelphia.

QUESTION PRESENTED

Whether the Natural Gas Act precludes the Commission from regulating the physical activities of natural gas production by establishing a "prudent operator" standard in certificates of public convenience and necessity authorizing sales of natural gas in interstate commerce.

STATEMENT OF THE CASE

In the interest of brevity, Louisiana will not recount the procedural history of this proceeding, an undertaking which will be performed by other respondents. The opinions below and jurisdiction of this Court are correctly set forth in the Commission's brief.

ARGUMENT

The "Production or Gathering" Exclusion of the Natural Gas Act Precludes the Commission from Adopting Order No. 539-B and Thereby Regulating the Physical Activities of Natural Gas Production

Despite the fact that the "prudent operator" standard relates to the day-to-day physical activities of natural gas production,[1] the Commission argues that

[1] Order No. 539-B states that:

> This standard encompasses the obligations to develop the properties consistent with the performance requirements of lease agreements with mineral owners and/or assignors; all valid rules and regulations of any Federal, state or local government having jurisdiction; and the standard of what a reasonably prudent producer would do with respect to the drilling, completion, workover, recompletion or abandonment of wells. (Commission Pet. App. at 20(a), footnote omitted).

the "production or gathering" exclusion in section 1(b) of the Natural Gas Act does not prohibit the inclusion of the standard in certificates issued by the Commission to producers. The Commission's interpretation of the Act extends the scope of the Commission's authority beyond that intended by Congress. The Commission's position is based solely on the unsupported theory that the power to enforce a "prudent operator" standard is somehow implied in the Commission's jurisdiction over sales for resale of gas pursuant to section 1(b) of the Act.[2]

The Commission's theory not only awards more authority to the Commission than Congress intended that it should have but also vitiates the congressional intent that the states should retain control over the physical activities of natural gas production. The "production or gathering" exclusion is not "superfluous." (Commission Brief at 25). It is the underpinning of the dual regulatory scheme which Congress envisioned when it passed the Act.[3] Indeed, a review

[2] The Commission makes no effort to disguise the fact that its position implies that it has authority over acts which relate solely to the physical processes of production. It states that it has "some jurisdiction over the physical acts of the producer and the physical operation of the facilities by which certificated service is rendered." (Commission Pet. at 8-9). AGD also argues that, despite the explicit language exempting "production or gathering" of natural gas, the Commission has authority to scrutinize licensees' "production activities." (Brief at 5).

[3] Furthermore, since this Court has interpreted the meaning of the production or gathering exclusion, the language would appear to be something more than "superfluous." Colorado Interstate Gas Co. v. FPC, 324 U.S. 581, 603 (1945).

of the Act and this Court's decisions establishes that the exclusionary language, far from being superfluous, is fundamental to the regulatory system Congress intended to create.

Section 1(b) of the Act sets forth the scope of the Commission's jurisdiction. That jurisdiction is limited to:

> . . . the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate consumption for domestic, commercial, industrial or any other use, and to natural-gas companies engaged in such transportation or sale, . . . 15 U.S.C. § 717(b).

In drafting the Act, Congress took care specifically to withhold jurisdiction from the Commission in certain areas. Thus, section 1(b) of the Act states that the provisions of the Act shall not apply to ". . . the production or gathering of natural gas." 15 U.S.C. § 717(b).

This Court has consistently emphasized that the Act grants *limited* authority to the Commission and that Congress meticulously precluded the Commission from exercising jurisdiction in any but three areas.

> Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. *Panhandle Eastern Pipe Line Company* v. *Public Service Commission,* 332 U.S. 507, 516 (1947).

Additionally, in *FPC* v. *Panhandle Eastern Pipe Line Co.,* 337 U.S. 498 (1949), this Court said:

> Without entering upon another review of its legislative history, suffice it to say that the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies. Accordingly, Congress in § 1(b) of the Act not only prescribed the intended reach of the Commission's power, *but also specified the areas into which this power was not to extend.* 337 U.S. at 503. (emphasis added).

An area expressly exempted from the Commission's jurisdiction was "the production or gathering of natural gas." Congress intended that the power to regulate production activities would remain vested in the states and that they would continue to regulate these activities.

In passing the Act, Congress took care not to supplant any authority of the states but rather sought only to regulate the area which the states constitutionally could not reach. Thus, in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission, supra,* this Court emphasized that:

> The Act, through extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions. The Act was drawn with meticulous regard for the continued exercise of state

power, not to handicap or dilute it in any way. 332 U.S. at 517-518.

Further, in *FPC* v. *Panhandle Eastern Pipe Line Co., supra,* this Court stated:

> The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states. This probably occurred because the state legislatures had delegated broad and elaborate power to their regulatory bodies over all aspects of producing gas. The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. *Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other.* Congress enacted this Act after full consideration of the problems of production and distribution. It considered the state interests as well as national interests. 337 U.S. at 509-514. (emphasis added).

The Act specifically preserved the rights which the states could exercise and were exercising when the Act was passed. The assertion of Commission jurisdiction over production activities which Louisiana and the other producing states have regulated for years would be inconsistent with the congressional purpose—often cited by this Court—not to invade the powers or prerogatives of the states.

The Commission argues that the court of appeals incorrectly considered the production or gathering exclusion separately from the affirmative grant of jurisdiction over sales for resale and incorrectly assumed that the exclusion takes precedence. The court of appeals did no such thing. In fact, the court of appeals followed the guidance provided by earlier de-

cisions of this Court and construed the "two relevant clauses" together to further the congressional purpose. In *United Gas Improvement Co.* v. *Continental Oil Co.* (Rayne Field), 381 U.S. 392 (1965), this Court distinguished between sales for resale and production or gathering, but found that the sales of leaseholds in question in that case constituted sales of gas:

> In the context of such a sale, . . . the "production or gathering" exemption relates to the physical activities, processes and facilities of production or gathering, but not to sales of the kind affirmatively subjected to Commission jurisdiction. *This accommodation of the two relevant clauses of § 1(b) gives content to the national objectives of the Natural Gas Act as expounded in Phillips, and to the Commission's jurisdiction to accomplish them, while in no way interfering with state regulatory power over the physical processes of production or gathering in furtherance of conservation or other legitimate state concerns.* 381 U.S. at 402-403.

The Commission recognizes that Order No. 539-B attempts to govern the physical processes of natural gas production. (Commission Brief at 32-33). On its face, the standard enunciated by the Commission—"what a reasonably prudent producer would do with respect to the drilling, completion, workover, recompletion or abandonment of wells"—is an effort to regulate precisely that which this Court has found the Commission to be powerless to regulate. The Commission simply has ". . . no control over the drilling and spacing of wells and the like." *Colorado Interstate Gas Co.* v. *FPC, supra.*

Some practical problems highlight the degree to which Order No. 539-B ignores and undercuts the dual

federal-state regulatory scheme devised by Congress. The Commission has adopted a standard which it found in the rules and regulations of state conservation agencies.[4] The standard has been interpreted by state courts in resolving questions arising under mineral leases. Each producing state has developed its own body of law surrounding the "prudent operator" standard, and it is doubtful that the standard is uniformly applied in all jurisdictions. More important, there is no assurance that the Commission will always interpret the standard in the same way as do the states. The potential therefore exists for intolerable conflict between state and federal agencies over the proper interpretation of state law. The Commission's brief provides no reassurance that such conflict can be avoided. The Commission states:

> Application of the prudent operator standard to particular cases will depend on the circumstances, but state law and the United States Geological Service regulations will *ordinarily* provide the specific contents of the standard and hence the yardstick against which the producer's performance is measured. (Commission Brief at 32-33). (emphasis added).

It requires little imagination to foresee an "extraordinary" situation which will present a conflict between the Commission and a state agency over the proper interpretation of the "prudent operator" standard. It was in part to avoid the possibility of such conflict that Congress took care to reserve exclusively to the states the power to regulate production activities.

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[4] *See, e.g.*, Title 30, Louisiana Revised Statutes (1950).

CONCLUSION

For the reasons stated above, we respectfully request the Court to allow the decision of the court of appeals to stand.

Respectfully submitted,

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